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In the Supreme Court of the United States

OCTOBER TERM, 1929.

UNIVERSAL BATTERY CO.,
Petitioner,
vs.
THE UNITED STATES,
Respondent.
No. 127

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

THE OPINION OF THE COURT BELOW

The Court of Claims rendered no opinion. The Special Findings of Fact and Conclusion of Law upon which the judgment is predicated (R. 17-26) are expected to be reported in Volume 67, Court of Claims reports.

JURISDICTION

The judgment of the Court of Claims was rendered on December 3, 1928, (R. 17). The petitioner's motion for a new trial made on January 7, 1929 (R. 26) was overruled by the Court on March 11, 1929 (R. 26). The petition to this Court for Writ of Certiorari was filed on June 4, 1929. Jurisdiction of this court to issue the writ is prayed under Section 240 of the Judicial Code as amended by Section 3 (b) of the Act of February 13, 1925, (43 Stat. 938).

STATEMENT OF THE CASE

The facts in this case are fully set out in the Special Findings of Fact (R. 17-21) made by the Court below. In brief they are:

The petitioner is and has been since 1913, manufacturing and selling storage batteries and storage battery parts. During the period from March 3, 1919, to October 30, 1923, the petitioner paid to the respondent manufacturers excise taxes, penalties and interest in the sum of $27,872.61, upon the sale of storage batteries under section 900, subdivision (3), of the Revenue Acts of 1918 and 1921. The Commissioner of Internal Revenue, on May 15, 1924, denied a refund claim for this amount with interest. The petitioner brought action in the Court of Claims on October 3, 1924, for the refund claimed except for $2,566.31, admittedly barred by the statute of limitations. (R. 17-21.)

The batteries sold by petitioner, during the period in question, were of the same type and kind as had been used, long before the advent of the automobile, in innumerable mechanical devices, where a readily accessable flow of electric current is required. Prior and subsequent to the employment of such batteries in the automobile they were used in signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electro-plating, etc. (R. 19-20).

A technical description of the composition of the batteries manufactured by the petitioner can be found in the Special Finding of the court below. (R. 19).

The batteries manufactured by the petitioner reached the consumer through battery distributors, jobbers, radio dealers, garage men and accessory dealers. The petition-

er could not know to what use its batteries would be put when sold by it. The petitioner cannot tell what percentage of its batteries are used for any particular purpose. (R. 28, Par. IX).

No automobile required petitioner's batteries as standard equipment. Any one of the several types of batteries manufactured by the petitioner could be adapted for use in some make of automobile. None of the batteries were made for use in any particular automobile unless the purchaser specifically requested it. Some arrangements of cells might limit the petitioner's batteries to some automobile but would not limit them for the other uses. (R. 28, Par. X).

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals. Ninety-nine per cent of its product left its factory without any terminals. The petitioner did not know what sort of terminals were going on its batteries after they were sold. (R. 28, Par. XI). It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain identical provisions with respect to the question involved in this case and are as follows:

"Section 900. On and after February 1, 1919, [1918 Act; 'January 1, 1922,' 1921 Act] there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) three per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, five per centum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), five per centum."

Regulations 47 promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows with respect to what constitutes a "part for an automobile truck, automobile wagon, other automobile, or motor cycle," i. e.

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory'."

* * * * *

"Art. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle."

* * * * *

"Articles, however, which ordinarily would be classed

as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Art. 16. provides: "An accessory for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories'."

SPECIFICATION OF ERROR

The Court of Claims erred in finding that the storage batteries manufactured and sold by the petitioner were parts or accessories of automobile trucks, automobile wagons, other automobiles or motor cycles and subject to the manufacturer's excise tax.

SUMMARY OF ARGUMENT

I. The number of similar suits pending in the lower courts and the amounts involved in them warrant the grant of this petition.

II. The decisions of the Court of Claims are confusing,

apparently irreconcilable and do not appear to be applying uniform tests of principle.

III. The Supreme Court has never construed the statute sections involved.

IV. An unappealed decision of a District Court is in conflict with the decision of the court below.

V. Decision by the Supreme Court should eliminate much pending litigation.

VI. It was error to hold that the commercial commodity ordinarily and customarily sold by the petitioner and not primarily adapted for use in automotive vehicles was a part or accessory of such vehicles at the time of sale.

VII. It was error to rest the judgment below upon a case decided upon materially different facts.

ARGUMENT

I. Similar Actions Pending.

One hundred and seven suits involving $2,691,993.42, exclusive of interest, were pending in the Court of Claims alone, at the time this application for writ of certiorari was filed, on the sole question of whether the articles involved in those claims are "parts or accessories" of automotive vehicles. Of these suits fifty-three involved storage batteries of various makes and designs. The petitioner has no device for ascertaining the number of similar cases that may be pending in the United States District Courts.

The point involved in this application is, therefore, of substantial consequence to a number of litigants not to mention innumerable taxpayers who are not litigating these questions.

II. Decisions of the Court of Claims Are Confused and Confusing.

If the decisions of the Court of Claims itself had been uniform and consistent, litigants before that court and the members of its bar might be clear as to what the law in cases of this sort really is. This clarity, however, is lacking. Uniform concepts of principle apparently have not been applied.

In *Atwater-Kent Manufacturing Company v. United States*, 62 Ct. Cls. 419, (decided June 14, 1926) it was held that certain "timers and coils" manufactured by the plaintiff were not taxable as parts or accessories of the automotive vehicles designated in the taxing statute. It was found, as a fact, that timers and coils are used on and are essential to the functioning of *all* internal combustion engines that require ignition of compressed gas. These timers and coils were used prior to the advent of the automobile and were extensively used in industries other than the automotive. Any one of these timers and coils could, by adjustment, be used for other purposes than in automobiles. In the opinion the Court announced what it subsequently said was the doctrine in the case as follows:

> "Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

Cole Storage Battery Company v. United States, 65 Ct. Cls. 164, (decided April 2, 1928) held that electric storage batteries sold by that plaintiff were taxable under the statute. It was found as a fact that storage batteries

were manufactured prior to the advent of the automobile and were used for many enumerated purposes other than upon the automotive vehicles designated by the statute. It was found that plaintiff's batteries were designed for the special purpose of being used to replace a component part of automobiles. As to the controlling principle, the Court said:

> "The fact that a storage battery is available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible for use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery, and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue."

The only reference to the Atwater-Kent case made in this opinion, which so sharply conflicts with the doctrine announced in that case, is as follows:

> "The *Atwater-Kent Manufacturing Co.* case, 62 Ct. Cls. 419, is self-explanatory."

Subsequent to the decision in the *Cole Storage Battery Company* case the Court decided, on October 22, 1928, *Milwaukee Motor Products, Inc. v. United States*, 66 C. Cls. 295. In this case timers made by the plaintiff were found to be necessary for use on internal combustion engines. They were especially advertised for use on automobiles, particularly Fords, though also advertised for use on tractors and on any gasoline engines. The Court found that Ford engines were used in tractors, stationary power plants, concrete mixers and in other non-motive vehicle functions. The Court in deciding this case made no reference whatever to its decision in the Cole Storage Battery Case but said:

> "We believe that this case should be determined by the doctrine announced in the Atwater Kent case, supra:
>
> 'Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes'."

Concerning this decision the Government's motion for a new trial said:

> "The decision in the pending case cannot be reconciled with the judgment in the Cole Storage Battery case."

With this statement we are in full accord.

Six weeks later, on December 3, 1928, the Court decided the case on which the present petition is urged. Notwithstanding what would seem to be controlling similarities to *Atwater-Kent Manufacturing Co. v. United States*, discussed above, the Court made no reference to

that case in its decision and decided the present matter solely on authority of *Cole Storage Battery Company v. United States*, 65 C. Cls. 164.

On March 11, 1929, the Court decided *Berg Brothers Manufacturing Company, Inc. v. United States*, 67 Ct. Cls. ——.

There a timer sold by the plaintiff was manufactured specifically for Ford internal combustion engines used in automobiles or tractors. It was advertised as "Berg timers for the Ford" also as "Berg timers for Fords." The Court, in holding this timer not to be a part or accessory of an automobile said:

> "It is apparent that plaintiff's timers were not specially designed nor primarily adaptable only for use on or in connection with automobiles. The Milwaukee Motor Products, Inc. case, supra, is decisive of the present case. See also *Atwater-Kent Manufacturing Company v. United States*, 62 Ct. Cls. 419."

No reference is made in the opinion to the decision in *Cole Storage Battery Company v. United States*, or to the case which is the subject of this petition.

The last decision of the Court of Claims which is pertinent to the general principle is that in *Edison Storage Battery Supply Company v. United States*, 67 Ct. Cls.— (decided May 6, 1929). In that case it was found that batteries manufactured by the plaintiff were taxable because they were utilized for furnishing automotive power for automobile trucks, were advertised for this use and were shipped by the plaintiff to consumers for such use. The Court said:

> "The facts clearly show that the Edison battery possesses all the necessary characteristics of a bat-

> tery for furnishing, and does furnish, motive power to automobile trucks. The fact that these batteries can be used for other purposes is not important. There are many parts of an automobile that can be and are used for other purposes. The form of battery taxed here was clearly specially adapted and designed and advertised to meet the requirements of motive power on automobile trucks."

The Court cites with approval *Cole Storage Battery Company v. United States*, 65 C. Cls. 164.

The opinion makes no reference whatever to the decisions of the Court in *Milwaukee Motor Products, Inc. v. United States*, and *Berg Brothers Manufacturing Company, Inc. v. United States*, both referred to above, in which cases timers were especially adapted, designed and advertised to meet the essential requirements of ignition in internal combustion engines and in automobile engines. Reconciliation of these cases with the decision in both the *Edison Storage Battery Supply Company* and the *Cole Storage Battery Company* cases appears to have been too difficult a task even for the Court to undertake.

The Court does, however, announce that what it meant to hold in the *Atwater-Kent Manufacturing Company* case, 62 C. Cls. 419, was that:

> "timers and coils were not to be classified as parts of automobiles simply because they might be used on automobiles, in the absence of proof that at the time when sold it was intended that the articles should be used on automobiles, and where also there had been no setting aside or allocation by advertising or otherwise of timers or coils for automobile use."

No attempt is made to reconcile this principle, newly

discovered to have been employed in the Atwater-Kent case, with the decisions of the Court in *Milwaukee Products, Inc. v. United States*, 66 Ct. Cls. 295, *Berg Brothers Manufacturing Company, Inc. v. United States*, 67 Ct. Cls. —— (decided March 11, 1929).

The truth is that it is practically impossible, if not altogether so, for members of the bar to determine just what principles the Court of Claims is going to apply in deciding what constitutes a part or accessory of the automotive vehicles designated in the taxing statute. Other decisions of the court might be cited to demonstrate this perplexity but the above decisions have been selected to illustrate the difficulties which meet one who approaches the problem with even unprejudiced purposes. Until a guiding principle is laid down by this Court, to which standard the Court of Claims can resort, much uncertainty resulting in wasteful litigation would seem to be unavoidable.

This Court has the opportunity to terminate much of this substantial waste and this distressing uncertainty by granting the petition in the present case.

III. This Court Has Never Construed These Sections of Statutes Involved.

While millions of dollars in taxes have been collected under the sections of the revenue acts cited, we have not yet had any construction by this Court of the phrase "parts or accessories." We have not had a construction even by a Circuit Court, of the principle involved in these acts.

A thorough search of decisions of this Court indicates that no substantially equivalent cases have been decided here since Magone v. Weiderer, 159 U. S. 555, decided in 1893. That case was the last of a line of cases on tariff

rate classifications and brought to this Court the question of whether certain pieces of glass constituted "parts" of clocks, or articles of glass. Mr. Justice White summarizing and reconciling similar but possibly conflicting decisions, held that the classifications of this character were to be decided by the use to be made of the article. Approving the "chief use" as the determining factor, he said:

> "Chief use, in itself, is a vague and uncertain term. Magone v. Heller, therefore, held that chief use was to be ascertained by that which was commonly, practically and generally done and was not to be overthrown by an occasional exception for practical or experimental purposes."

He also said:

> "if it [a substance] is commonly, practically and profitably used for a different purpose, it cannot be considered as used expressly for manure, even if, in the majority of instances it is so used."

The use of the rule thus announced in the tariff classification cases has been suggested to the Court of Claims in a number of briefs filed in causes involving the excise taxes on parts or accessories of automotive vehicles designated by the statute but thus far that court does not seem to have found such a doctrine helpful. If resort to that group of decisions is of no avail we are, in the absence of the construction of the statutory sections here involved, without a reliable guide from this tribunal.

IV. The Unappealed Decision of a District Court Is in Conflict With the Court of Claims Decision.

In *Philadelphia Storage Battery Co. v. Lederer*, and an associated case, 21 Fed. 2nd 320, Judge Dickinson, sitting in the U. S. District Court for the Eastern District of Pennsylvania, held that storage batteries could not be taxed as automobile parts or accessories when they are so extensively known as articles of commerce for non-automobile uses.

In his opinion he said:

> "Our finding is that there is no such thing as 'an automobile storage battery' or a 'storage battery for automobiles' in the nomenclature of the trade and no 'article' or thing so known. It follows that the plaintiff did not make or sell any. What it sold were 'storage batteries' and these are not taxed by the Act. The construction which we give to the phrase 'sold for automobiles' is not anything which the seller or buyer intends for automobile use or that which is in fact so used nor anything which is adapted to such use but it is whether the thing attempted to be taxed can be identified as the thing which the law has taxed by the name or descriptive phrase used in the law."

Though this decision of Judge Dickinson is in conflict, in both the doctrine of construction announced and in its application, with the decisions of the Court of Claims the Government has not sought to appeal the holding. We are thus afforded no opportunity to cite a possible conflict between a Circuit Court of Appeals and the Court of Claims on the question involved in this application.

V. Decision by This Court of the Question Involved Should Eliminate Much Pending Litigation.

It is to be presumed that the more than one hundred

actions brought in the Court of Claims, not to mention the United States District Courts, have been brought in good faith upon the conclusions of the attorneys involved that the application of the law by the Commissioner of Internal Revenue is probably erroneous. In the absence of something in the way of final pronouncement by this Court regarding the principles which shall control in determining whether a given article is a "part or accessory," it is to be presumed that not only will these pending cases be tried before the Court of Claims and the District Courts but good faith and thoroughness will require an effort, in many of them, to secure a decision of this court. It is reasonable to suppose that a great number of writs of certiorari will be applied for from this court in the event the parties are dissatisfied with the decisions of the courts below.

It seems fair to prophesy that if this court will grant the writ of certiorari in the present case and announce the principles which shall determine in the application of the taxing act not only will much of the time of the Court of Claims and the District Courts be conserved but this Court itself will obviate the repeated necessity of its considering applications for writs of certiorari in cases similar to that now at bar.

VI. The Court of Claims Erred in Deciding That the Term "Parts or Accessories" of Certain Automotive Vehicles Includes a Device Not Found to Be Specially Designed for Use in Such Vehicles, but Found to Be a Commercial Commodity Ordinarily and Customarily Sold for Many General Uses Other Than in Automotive Vehicles.

In this case, upon which the writ is sought, the Court

of claims found as facts:

A. "Storage batteries were in use for various purposes long before the automobile was invented." (R. 23, Par. VII).

B. "For the past twenty years, storage batteries such as are manufactured by plaintiff have been used in electric automobiles, gasoline-propelled automobiles, motor boats, farm tractors, farm lighting plants, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer camp lighting, for door-bells, in railway switches and for wireless telegraphy, and for other purposes where a dependable source of power is needed; also for radios, telephones, telegraph, and fire alarms and electroplating." (R. 23, Par. VIII).

C. "The plaintiff sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and has no means of knowing at the time of sale for what purpose its batteries will be used." (R. 23, Par. IX).

D. "No automobile manufacturers use plaintiff's batteries as standard equipment." (R. 24, Par. X).

E. "The arrangement of the cells of some types of plaintiff's batteries may limit them to a particular make of automobile, but would not limit them for other uses." (R. 24, Par. XI).

These findings mean that an article, (1) in use for a wide variety of purposes, prior and subsequent to the advent of the automobile, (2) sold for uses unknown at the time of its sale by the manufacturer, (3) not used by any automobile as standard equipment, (4) not limited for uses other than upon an automobile, (5) not found to be designed, or (6) primarily adaptable, for automotive use, was nevertheless determined to be a part or accessory of an automobile.

Discarding any attempt to reconcile the decisions of

the Court of Claims adverse to the payers of these excise taxes with its decisions favorable to such taxpayers, we think it clear that none of the facts found in the case at bar should bring the case within even the most hostile rulings of that court. The decisions of that court are grouped below according to what seem to be the determining facts respecting the article questioned.

Group I. The articles were held to be taxable because they were specially adaptable and designed with the purpose, and so advertised, of being used in automobiles; *Autoquip Manufacturing Company v. U. S.*, 67 Ct. Cls. —— (decided June 10, 1929), involving air pumps and anti-rattler window devices; *Cole Storage Battery Co. v. U. S.*, 65 Ct. Cls. 164, involving storage batteries; *E. Edelmann & Company v. U. S.*, 67 Ct. Cls. ——, (decided June 3, 1929), and involving clocks and anti-rattler window devices.

Group II. The articles were taxable because found to be especially designed and sold for use on automobiles; *Advance Automobile Accessories Corporation v. U. S.*, 66 Ct. Cls. 304, involving brake linings for Ford cars; *Amplus Storage Battery Company v. U. S.*, 67 Ct. Cls. —— (decided March 11, 1929), involving storage batteries; *Edison Storage Battery Company v. U. S.*, 67 Ct. Cls. —— (decided May 6, 1929), involving storage batteries; *Walker Manufacturing Company v. U. S.*, 65 Ct. Cls. 394, involving lifting jacks.

Group III. The articles were taxable because found to be adaptable for use on automobile engines and advertised for such use; *Bassick Manufacturing Company v. U. S.*, 67 Ct. Cls. ——, (decided June 10, 1929), involving gasoline strainers; *Borg & Beck Company v. U. S.*, 67 Ct. Cls. ——, (decided March 11, 1929) involving clutches for internal combustion engines; *The Fairmount*

Tool and Forging Company v. U. S., 67 Ct. Cls. ——, (decided June 3, 1929) involving hand tools assembled in kits.

It should be clear that the facts specially found by the court in the case at bar do not bring it within any of these groups. The petitioner's storage batteries were not found to be especially designed, or advertised, or sold, or intended to be sold for use on automobiles. Judged even by the non-conflicting decisions of the Court of Claims, the holding in the petitioner's case was in error.

If the doctrine of this court, as announced in the tariff classification cases of *Magone v. Wiederer*, 159 U. S. 555, and *Magone v. Heller*, 150 U. S. 70, is the proper method for determining what constitutes a "part" then certainly the foregoing facts found in the case at bar do not make the petitioner's storage batteries automobile parts. That is to say this court has said in the Wiederer and Heller cases that whether or not a substance, or an article, is a part of a designated assembly depends upon whether the use of that article, or substance, in such designated assembly is its "chief" use. If the substance or article is commonly, practically and profitably used for different purposes its chief use cannot be said to be in the designated assembly. Hence it is not a "part" of that assembly.

If this be the proper test applicable to the petitioner's batteries certainly the facts found by the Court of Claims would not warrant finding these batteries to be parts for automobiles. The common, practical and profitable use of the petitioner's batteries for many other purposes should effectively bar their classification as parts of automobiles.

If granted the writ now prayed for the petitioner is prepared to develop the thesis that error exists in the decision below in view of the law generally.

VII. The Sole Authority Assigned by the Court of Claims for Its Decision Is Its Own Holding In Cole Storage Battery Co. v. U. S., the Determinative Facts in that Case Are so Obviously Absent in This That Error Is Apparent.

It is important to compare the facts in the petitioner's case and those in the Cole case because this court has heretofore refused the application for a writ of certiorari in that case (October 29, 1928).

Below we give the determinative facts in *Cole Storage Battery Company v. U. S.*, 65 Ct. Cls. 164, which is the case cited by the court below as the basis of its decision in the case at bar. Directly beneath the statement of each determinative fact in the Cole Storage Company case we point out the contrast in the case at bar.

1. In the Cole case it was found, "Plaintiff during the period involved in this suit, manufactured and sold lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles."

In the case at bar the petitioner did not sell batteries designed for the special purpose of being used to replace a component part for automobiles. It was found, as a fact, that no automobile manufacturer used the petitioner's batteries as standard equipment. It was found that no battery of the petitioner was made to fit any particular automobile unless specially ordered. It was found that any arrangement of the cells on the petitioner's batteries did not limit them for other uses than on automobiles.

2. In the Cole case it was found: "Plaintiff's business policy was to manufacture a battery which would be used

on any make of automobile equipped with a storage battery."

In the case at bar it was not found that it was the petitioner's business policy to manufacture a battery which would be used on any make of automobile. As a fact, it was found that the petitioner had no means of knowing at the time of sale for what purpose its batteries would be used. The petitioner did not know what percentage of its batteries are used for any particular purpose. Finally it was found that the batteries manufactured by the petitioner had straight terminal posts and that the petitioner did not know what kind of terminals (a feature which determines the use for which the battery is employed) were going to be put upon its batteries after they were sold.

3. In the Cole case it was found: "Plaintiff specialized on a battery with thin plates, as this would tend to produce a battery with more spontaneous action for the starting device of an antomobile."

In the case at bar the petitioner did not specialize on a battery with thin plates to produce more spontaneous action for the starting device of automobiles. There was no finding to this, or any similar effect.

4. In the Cole case the court said: "* * * [This] manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualifications of his battery, and designs it as a part of the automobile into which it is to be introduced * * *."

It was not found that the petitioner sought the custom of the automobile trade as distinguished from any other trade. It was not found that the plaintiff designed its battery as part of the automobile into which it might be introduced.

While both the Cole Storage Battery Company and

the petitioner made and sold storage batteries, we find it impossible to discover from a review of the determinative factual findings of the Court of Claims in these two cases, any substantial similarity between the batteries and their purposes. When the Court of Claims decided the instant case against the petitioner it must either have confused the petitioner's design, batteries, and business policy with those of the Cole Storage Battery Company, or else it was acting upon the hypothesis that all storage batteries are parts of automobiles until utilized for some other purpose.

Upon either alternative there was error. There is no indication whatever that the petitioner's batteries were designed, were adaptable, or were sold for the special purpose found in the case of the Cole Storage Battery Company's batteries. On the other hand, no matter how well decided the Cole case may have been, that case, with its references to design for the special purpose of being used in automobiles, can afford no authority for a conclusion that all storage batteries are so designed or sold.

CONCLUSION

Because a pronouncement by this court of the true principles of law to govern the decision of similar cases should materially decrease the amount of litigation, relieve the burden of the courts below, as well as this court, and because injustice has been done to this petitioner below, it is submitted that the grant of the petition in this case would be of sufficient public importance to warrant such action by this court.

Respectfully submitted,

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